No. 4586

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

16

OSCAR SPORGEON,
Plaintiff in Error,

vs.

ANDREW F. MAHONY, et al.,
Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR.

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PRELIMINARY STATEMENT OF THE CASE.

This is an action for personal injuries asserted by the plaintiff to have arisen from the failure and neglect of defendants to keep the steamer "John C. Kirkpatrick" and her appliances in a reasonably safe condition. The particular neglect of duty charged in the complaint is that the defendants failed to exercise reasonable care that a certain bolt "was so fastened that the same would resist an ordinary pull for which said bolt was intended." It is further alleged that the bolt was loose and dangerous "on account of the manner in which it was fastened to the deck and on account of

the rotten condition of said deck'' and that while a winchman was pulling on a rope which was fastened to the bolt, it was pulled out and the rope to which it was fastened struck the plaintiff and caused the injuries on account of which the suit is brought.

The answer denies all negligence specifically and generally and sets up several affirmative defenses, namely, that the injury arose solely through the plaintiff's own negligence, that the defendants exercised reasonable care in providing a safe place to work, that plaintiff assumed the risk and that plaintiff was contributorily negligent.

For the sake of clarity we think it advisable to summarize briefly the facts developed upon the trial, reserving a more detailed analysis of the testimony for later discussion. The following is a brief narrative of uncontradicted facts:

On August 14, 1924, the steamer ''John C. Kirkpatrick'' was lying at the dock at the port of San Pedro, California. The crew and certain longshoremen were engaged in discharging a portion of her cargo of lumber. Plaintiff, who was second mate of the vessel, was in charge of the after end of the ship. It was desired to unload some cargo from the hold. In order to do this it was necessary to move from off the top of the hatch a number of bundles of laths which were not destined for discharge at that place. The first mate directed plaintiff to have these laths moved, and then went to the forward part of the vessel. He

did not specify the method whereby this should be accomplished—this being left entirely to plaintiff's own judgment. The cargo was to be moved from the hatch back to the forward end of the poop-deck. On the poop-deck is a windlass or capstan which can be used for moving cargo. In order to bring the load back to the desired spot without the necessity of moving the booms, plaintiff caused a line to be fastened to the top of the load which was suspended by the falls, and instead of merely taking this line around the heavy rolling chock or the bitts which were on the vessel for the purpose of feeding a line to this after capstan, plaintiff ran the rope back from the load through a ring-bolt screwed to the deck near the forward end of the poop, then caused the line to carry over sharply to the right, and then around the chock whence the line wound around the after spool of the capstan or windlass. A rough sketch of the after deck appears on page 36 of the transcript. The plaintiff was standing in the bight or angle of the line between the ring-bolt and the lead or chock, directing the operation. While the load was being heaved aft the ring-bolt pulled out of the deck, and the line straightening out suddenly threw the plaintiff back against some bitts, causing the injuries complained of. The evidence showed that the ring-bolt was not designed for the purpose of moving cargo at all, but was there for the purpose of lashing booms or lashing cargo to the deck, or for stopping lines. After hearing the evidence, the court, upon motion of defendants, directed the jury to return

a verdict for defendants. Judge Bourquin's summary of the case in addressing the jury is found at page 74 of the transcript.

This cause is now before this court upon a writ of error brought by plaintiff who contends that the court below erred in granting the motion for a directed verdict. Plaintiff in error and defendants in error respectively will be designated herein as plaintiff and defendants.

In support of our contention that the action of the court was proper, we propose first to review briefly the salient features of the testimony, after which will follow a discussion of the law applicable. Lastly, certain contentions of plaintiff relative to alleged negligence on the part of the mate will be dealt with.

Before, however, taking up the main body of the discussion, we desire to invite attention to the authorities discussing the rules covering the direction of verdicts in the federal courts.

RULE AS TO DIRECTED VERDICTS.

Plaintiff in his brief quotes Rule 93 of the Rules of the District Court, which of course governs the situation. This rule, however, does not require in order to make a directed verdict proper, that the evidence be entirely without conflict. The law is thus stated in

3 Foster, Federal Practice, (6th ed.) p. 2420:

> "A verdict should be directed in two classes of cases: where the evidence is undisputed, and where,

although there may be a slight conflict it is so conclusive in favor of one party that the court would feel obliged to set aside a verdict against him."

And in

Chicago, St. P., M. & O. Ry. Co. v. Belliwith, 83 Fed. 437, 440,

Judge Sanborn expresses the rule in the following language:

"The judges of the national courts are not required to submit a question to a jury merely because there is some evidence in support of the case of the party who has the burden of proof; but, at the close of the evidence, it is their duty to direct a verdict for the party who is clearly entitled to it, when it would be their duty to set aside a verdict in favor of his opponent, if one were rendered. At the close of the evidence there is always a preliminary question for the judge, before the case can properly be submitted to the jury; and that question is not whether there is literally no evidence, but whether there is any substantial evidence, upon which the jury can properly render a verdict in favor of the party who produces it. *Commissioners of Marion Co. v. Clark,* 94 U. S. 278, 284; *North Pennsylvania R. Co. v. Commercial National Bank of Chicago,* 123 U. S. 727, 733, 8 Sup. Ct. 266; *Delaware, L. & W. R. Co. v. Converse,* 139 U. S. 469, 11 Sup. Ct. 569; *Laclede Fire-Brick Manuf'g Co. v. Hartford Steam-Boiler Inspection & Ins. Co.,* 19 U. S. App. 510, 515, 9 C. C. A. 1, 4, and 60 Fed. 351, 354; *Gowen v. Harley,* 12 U. S. App. 574, 585, 6 C. C. A. 190, 197, and 56 Fed. 973, 980; *Motey v. Granite Co.,* 36 U. S. App. 682, 686, 20 C. C. A. 366, 368, and 74 Fed. 155, 157."

See also

Missouri Pac. Ry. Co. v. Oleson, 213 Fed. 329;

Chicago, St. P., M. & O. Ry. Co. v. Kroloff, 217 Fed. 525;

Fricke v. International Harvester Co., 247 Fed. 869,

to the same effect.

It is the contention of the defendants herein that upon a review of the record in this case it will become apparent that plaintiff produced no evidence and certainly no substantial evidence upon which the jury could properly have rendered a verdict in his favor.

THE RECORD DISCLOSES NO EVIDENCE OF NEGLIGENCE ON THE PART OF DEFENDANTS.

1. It is not disputed that the ring-bolt was not intended to be used for the purpose of moving cargo.

The implement asserted to be defective by plaintiff in his complaint is the ring-bolt which pulled out of the deck when plaintiff used it for the purpose of heaving a line through it. The difficulty, however, with plaintiff's case is that the undisputed evidence shows that the ring-bolt was not intended to be used for this purpose at all. This is not denied by plaintiff and is affirmatively admitted by plaintiff's witness, Andrew Aezer, who was the shipwright that was called to repair the boat. This witness testified as follows (Tr. p. 48):

> "I see that kind of bolt every day; it is used for lashing the booms or for a stop for the lines. Such a bolt is not used for hoisting cargo around the deck, it is not intended for that, they should not use it for that purpose."

Captain Halvorsen testified (Tr. p. 50):

> "It is not intended to be used in connection with handling lines at all. I don't presume it was put in the ship for that purpose. I have never seen it used for that purpose on board the ship. This was the first time I had seen it so used."

H. Cleaver, former mate on the "John C. Kirkpatrick" testified also in this connection to the same effect (Tr. p. 53):

> "I have served two years as chief and second mate on the 'John C. Kirkpatrick;' that was in 1922 and 1923. I recall these ring-bolts located in the forward end of the poop-deck; they were there for the purpose of lashing the boom, and I never saw them used for any other purpose."

All the testimony shows that the method adopted by plaintiff in using this bolt for the purpose of moving cargo was not only improper, but dangerous. Captain Lancaster, master mariner for twenty-two years, testified as follows (Tr. p. 55):

> "It shows very poor seamanship to move a load of laths from the forward part of the vessel by running a line through that ring-bolt and then around the lead, and then around the windlass. By leading a 'rope yarn over a nail' there is caused so much friction in the ring-bolt, if the line carried away, not only would it be endangering the winch-driver on the after-deck, but the line on the rebound would kill somebody at the winch and

the cable. The ring-bolts were placed there to lash the boom down, the old booms, before the new booms were put on; they were so long they had to build a chock to rest the boom on and rest it over the bitts, necessitating an entirely new deck arrangement for lashing booms. From the appearance and position of these bolts it would be apparent to anybody that knows seamanship that they are not to be used for moving cargo, because they are not proper bolts in deck construction."

We also quote from the testimony of Archibald L. Becker, a consulting engineer and shipbuilder (Tr. p. 57):

"They (the ring-bolts) could not be used as a lead to a windlass for the reason that an ordinary snatch-block hooked into either of these rings would not bring the line fair to the spools of the winch, without a pennant intervening between the ring and the snatch-block. In my opinion the location of those bolts would indicate instantly to an expert seaman that they were not designed in connection with pulling cargo, because the balance of the equipment on the ship would give an illustration to even an ordinary seaman that those things were much below the standard of requirement for the purpose of handling cargo. The appearance of them as constructed would be alone sufficient to indicate that they were not there to be used for that purpose; also with reference to the location this applies.

Q. Now, Mr. Becker, supposing in moving a load of laths from over the top of the hatch to some place further aft on this vessel, a line should be run from the top of the hook, through this ring-bolt to the deck, you have just told us about, and then to the right around the lead or chock, and into the windlass, would that, in your opinion, be a proper

method for accomplishing that result?

A. Well, that would be the height of folly, to use the ship's equipment in that way, by passing that manila line through that solid ring-bolt.

Q. Why?

A. Because it would wear the line out, if nothing more, and destroy the equipment. Furthermore, in passing the line through there, and if there was a great stress on there, the intensity of pressure on that ring-bolt against the line would have a tendency to part the line. If the line parts with a strain on it, then the result is that the end flies against the operator of the winch, or else the whole load goes back, and swings into the rear house, and endangering the men there. It is the height of folly to pass a line through the solid eye of a ring-bolt, both from an economical standpoint and a technical standpoint.

Q. In your opinion, is that a proper use of that ring-bolt either with or without a snatch-block?

A. It is not, because the ring is not installed in a way to resist a transverse strain."

In fact, plaintiff's action in running this line through the ring-bolt is not attempted to be defended by plaintiff's own witnesses. Captain Ainsworth said (Tr. p. 41):

> "No bolts are put in for the purpose of putting lines through it."

And Mr. Moriarity testified (Tr. p. 44):

> "I would not consider it good seamanship to use a bolt without using a block."

And finally, plaintiff himself said on cross-examination (Tr. p. 38):

> "By running this line through this bolt, I was subjecting the rope to quite a lot of wear, and if the

rope carried away, it would have hurt the men back of the hatch."

In the light of the foregoing, it certainly could not be successfully contended that the bolt was being used at the time in the manner in which it was intended to be employed.

2. There is no evidence of any custom or practice obtaining for the use of this bolt for the purpose of moving cargo on the vessel.

Apparently realizing the futility of attempting to prove that the ring-bolts were being used properly at the time, plaintiff attempted to show at the trial that the bolts had been used for moving cargo on prior occasions. Laying aside all questions of variance between pleading and proof, and also of the legal sufficiency of such proof to make out a cause of action, we desire to call attention to the state of the record on this subject.

The plaintiff testified that the ring-bolts were being used by the chief officer and the third officer in loading the vessel (Tr. p. 28). While this is denied by the captain, who testified that he was present during the loading, and that neither these ring-bolts nor any ones like them were used in connection with the loading of the cargo (Tr. p. 51), we recognize that the plaintiff's statement must be taken as true, for whatever it may be worth, in determining the correctness of the court's ruling in directing the verdict for defendants.

The plaintiff, however, had been on the vessel for over two months (Halvorsen, tr. p. 50), and all he testifies to

is that on *one occasion* prior to the accident, the bolts were used in connection with the discharge of cargo.

That is the only testimony in the record as to any previous use of the bolts for the purpose of moving cargo.

The witness Lauritzen does not testify that the bolt was ever used at all for the purpose of moving cargo. He does not testify, as plaintiff claims in his brief (p. 11) that

> "I saw them use this particular bolt in many places the same as it was used that time."

An examination of the transcript at the reference cited by counsel (Tr. p. 22) shows that counsel is attempting in his brief to put into the witness' mouth what he would not say at all.

On the other hand, Mr. Lauritzen's testimony is positive and unequivocal to the effect that *this was the first instance he had ever seen* of a bolt being used like the one involved in the present case was employed at the time of the accident. We quote from his direct examination (Tr. p. 21):

> "I do not know if I have ever seen an eye-bolt used like this one was used; I suppose it was used to get the best lead aft."

And again from his redirect examination (Tr. p. 23):

> "Q. You never saw a bolt used like this before this time for that purpose, did you?
>
> A. I could not say exactly that I have because I never,—I could not say that, not a bolt like that. There are so many different kinds of bolts on a ship. I don't remember seeing one used like that for that purpose before."

The witness Cleaver, who was on the vessel two years prior to the accident testified that he never saw the ring-bolts used in connection with moving cargo around the deck (Tr. p. 53). Likewise Captain Halvorsen, who had been on the vessel a little over a year, testified that he had never seen the bolt used for the purpose of moving cargo before the present instance (Tr. p. 50).

There is moreover, no evidence whatever that the defendants had any notice or knowledge of the existence of any such practice, even assuming that it existed at all.

3. It is not disputed that the ring-bolt was of proper and customary construction for the purposes for which it was put into the vessel.

The record shows that while a lag screw, such as is employed in this case would not be a proper instrument with which to move cargo, it is an entirely proper and customary appliance for the purpose of lashing booms or cargo, or for stopping lines. Plaintiff's witnesses all agree to this.

Ainsworth (Tr. p. 41):

> "I have seen bolts of this kind used for lashing booms, very frequently, it is common construction. The bolt is quite satisfactory for lashing cargo or booms to the deck."

Moriarity (Tr. p. 43):

> "I have seen bolts of this kind used to lash down booms with on deck."

Aezer (Tr. p. 48):

> "I see that kind of bolt every day; it is used for lashing the booms or for a stop for the lines."

Of course, defendants' witnesses testify to the same effect.

Captain Halvorsen (Tr. p. 50):

> "A bolt of this kind is a common thing on board such vessels. It is used for lashing down of booms, for stopping of lines, that is what it in most instances is used for."

Cleaver (Tr. p. 53):

> "These bolts are commonly used on steam schooners; screwed to the deck, and used to lash booms with, and for lines and so forth, to keep lines from washing overboard. Life-boats are lashed down with it."

Lancaster (Tr. p. 54):

> "I have seen the ring-bolt on the forward part of the poop-deck. They were placed there to lash the old booms down with. That is absolutely proper and usual construction on vessels of that sort. It is proper and customary to put lag screws in for that purpose. Time and again I have seen that done in steam schooners."

Becker (Tr. p. 57):

> "I consider a ship properly equipped when it has lag screws for the purpose of lashing down the booms. I have inspected the 'John C. Kirkpatrick'. I found ring-bolts of such nature there; they are placed in pairs, and the impression I got of them was that they were there to secure the booms at some previous time. I noticed that they had put a new chock on the deck, and had moved

> the booms out more, and raised them up, and I assume that the eye-bolts were used for that purpose before this addition or change was made. At this time, I see that they can be used for lashing tanks, or some bulky load that the ship might take on deck. They could be used for lashing the booms in their present location, but, of course, if the booms were stowed away there, the long booms they have there would interfere with the handling of the lines, and that was probably the reason for moving the booms outward."

Finck (Tr. p. 57):

> "A ring-bolt is used for stoppers for lines, for mooring lines, it is sometimes put there to make the booms fast."

It is submitted that the foregoing leaves no doubt as to the purpose for which the bolts were put into the vessel and the propriety of their construction for this purpose.

Parenthetically it might be noted also that plaintiff utterly failed to produce any testimony that the bolt was not suited for the purpose for which it was put into the vessel, namely, lashing booms or cargo or the like, or that it was not in good condition for such use. His own witness Aezer, completely negatived his charge that the deck was in a rotten condition. Mr. Aezer was the man that replaced the bolt in question and consequently was in a position to know exactly the condition of the deck. His testimony in this connection is very significant (Tr. p. 48):

> "The wood did not indicate that it had been torn, *and it was perfectly sound and there was no*

indication of rottenness. The bolt is screwed into the deck and there is no chance of any leakage, and no water could get in down over that screw."

4. **Proper equipment was provided for the purpose of moving cargo around the deck.**

The testimony conclusively shows that it was not necessary to use this ring-bolt at all to accomplish the task that plaintiff had to do. The evidence shows that on the vessel were good substantial bitts and a heavy rolling chock built for the purpose of feeding lines to the windlass in order that cargo could be moved to any part of the vessel desired. The plaintiff himself admits that these appliances were properly and solidly constructed (Sporgeon, Tr. p. 39).

> "The heavy rolling chock is built right into the ship, it was properly secured in good working order, and so solid that you would have to pull out the deck in order to pull it out. I do not know if the bitts were of wood or steel, but they were fastened to the ship, of good solid construction."

Captain Halvorsen (Tr. p. 51):

> "Other methods can be used to move the cargo back, that will accomplish the same result as speedily and effectively. You can take it through the lead, that is to the gypsy head, and you can pass it round; there is two leads, one on each side, especially put on the deck for that purpose; these leads are built right into the deck and by using them you can put the cargo on any part of the ship you want."

Mr. Becker (Tr. p. 59):

> "I am familiar with the proper usage of a ship's equipment, and I have accomplished the same re-

sult of moving that load aft in several ways. A good way would be to take two lines, one to each spool around the rolling chocks that are provided there on the ship, and start the winch and throw either starboard or port side, and land it where you wanted to. The other way is to take the wood, tie it fast to the lead, put a snatch-block on the load, pull it back with the quarter chock, go ahead with the winch, and then load it wherever you want to. The latter way would not involve any more work than the other way I have mentioned, neither would it involve the expenditure of any more time, because the last way I outlined would not make it necessary to pass the end of the line through a solid eye, and overhaul it. That method would not be technical and obscure to a licensed seaman; they are all familiar with either way that I have described; either way would accomplish the result. The method I have described, or the equivalent, would be followed by a man having in mind the safety of the ship, and he would never resort to the sort of method as was followed here."

Mr. Cleaver, as stated, was on the vessel for nearly two years and was in charge of the after-deck for some thirteen months. During all of that period he had no difficulty in using the ship's equipment regularly provided for the purpose of moving cargo (Tr. p. 53):

"I never saw them (the ring-bolts) used in connection with snatch-blocks or otherwise, in moving cargo around the deck. I had charge of the operations of discharging cargo on the vessel for thirteen months, and nearly every trip we moved cargo from the forward part of the ship to the poop-deck. We had fair leads for that purpose, stationary on the vessel. The rolling iron-chock is stationary on the ship and to take it out you

would have to take practically the whole deck. It is easy and simple to move the cargo by that means alone. That is the way we did it before. I would not run a line through that ring-bolt and around this lead, over to the windlass, nor would I see other men do it either. It would not be safe, the rope will give way, if there is no fair lead, if there is no snatch-block in the ring-bolt."

Certainly it cannot be contended that there is any conflict on the proposition that it was not necessary to use this ring-bolt to accomplish the result desired.

5. It is not disputed that plaintiff himself was in charge of the work and selected his own method of using the ship's equipment.

It must be borne in mind that plaintiff was not an ordinary seaman but was a licensed officer, in charge of the after-part of the vessel. There is no contention made that plaintiff himself was not superintending the work at the time, or that anyone directed him to use the ship's equipment in the manner in which he did. On the contrary, all the testimony is that plaintiff was in complete charge and free to choose his own method of accomplishing the task he had to do. Indeed, plaintiff admits that he was in charge (Sporgeon, Tr. p. 37).

Other uncontradicted testimony by both plaintiff's and defendants' witnesses is to the same effect.

D. McFadden (Tr. pp. 44, 46):

"The second mate superintended the job * * * two sailors were in charge and they were taking orders from the second mate."

Lauritzen (Tr. p. 21):

> "The second mate had charge of the work on the after deck; I do not know where the first mate was, the first mate was looking after both ends; he had charge of the whole thing, and the second mate had charge of this particular operation."

Grande (Tr. p. 64):

> "Sporgeon had charge of the after end of the ship at that time. I gave him orders to see that different orders came aft. There was a load to be hauled aft and away from some other lumber that had to come out first. I gave him instructions to move it aft, but not how it should be done. I did not direct him how to put up the lines, he knows that much himself. That was left entirely to him. I did not give him (any) instructions as to the use of an eye-bolt. I did not see any of the operation of moving this lumber aft. I was in the other end of the ship then. I first heard of the accident an hour afterwards, when the winch-driver told me about it."

It thus appears that the plaintiff was in full charge of the operations and had the power and authority to choose any method of doing the work that he saw fit, and that he chose and employed the particular method employed here entirely of his own volition.

6. Even if the bolt were loose, which does not appear, it was the plaintiff's duty to inspect it.

Plaintiff has misquoted Mr. Mahony's testimony in connection with the routine employed on the vessel in the inspection of equipment. Mr. Mahony testified that anything wrong on the after-part of the vessel would

be within the jurisdiction of the *second mate.* It is quite obvious from the context that this is what is meant (Tr. p. 71).

> "If anything was wrong on that deck, the after end, that would be under the second mate. The mate would have to know if the bolts and screws were not in shape. He has charge of the after end, and reports that to his superior officer."

When the witness in the foregoing testimony says the "mate" he of course refers to the second mate, and not the chief officer, as plaintiff contends in his brief. Therefore if anything were wrong on the after end of the vessel, plaintiff himself would have been responsible.

The point, however, is not of great importance in our opinion as the record is devoid of any evidence that the bolt was not in entirely proper condition with reference to the purposes for which it was installed in the vessel.

THE LAW APPLICABLE TO THE SITUATION DEVELOPED BY THE EVIDENCE IS CONCLUSIVE AGAINST PLAINTIFF'S RIGHT TO RECOVER.

1. Defendants' obligation to furnish safe equipment is limited by the requirements of the purpose for which the equipment was furnished.

An examination of the authorities conclusively demonstrates that defendants cannot be held accountable for

plaintiff's injuries in this case, arising as they did, from the plaintiff's action in putting the ship's equipment to uses other than those for which they were intended. The general rule is thus stated in

3 Labatt's Master & Servant, (2d ed.), p. 2457, Sec. 921:

"A general principle which is frequently conclusive against the servant's right to maintain an action is that the master's duty in respect to his instrumentalities is restricted to seeing that they are reasonably safe for the performance of the functions for which they are designed.

In most of the cases in which this principle has been applied, the justice of admitting such a qualification of his liability is too obvious to be open to question. Thus, it would clearly be unfair to require him to answer for an injury, where the emergency which tested the quality or capacity of the instrumentality arose out of an occurrence which implied no culpability on his part. The same may be said of those decisions the essential presented feature of which is that the plaintiff or a coemployee caused the injury by putting some part of the plant to an absolutely improper use. 'Although it is a master's duty to use due care to furnish his servants tools and appliances suitable for the purpose for which they are provided, he owes them no such duty when they put his tools to uses for which they were not intended.' It is 'not negligence to omit a precaution applicable only to a situation which did not in fact exist.' It is universally agreed, therefore, that an employer is not liable where the servant's injury was not caused by any defect in the appliance which affected its safety when it was used in the ordinary manner and for the purposes for which it was intended."

See, also,

26 Cyc., 1149:

> "Where the place of work machinery or appliance was reasonably safe and suitable for the purpose for which it was intended, a servant cannot hold the master liable for personal injuries resulting from its inappropriate, unauthorized, unnecessary, careless, improper or unusual use or test."

A great many cases dealing with the subject are collected in a note in

16 L. R. A. (N. S.) 984,

the opening paragraph of which summarizes the rule as follows:

> "The courts are unanimous upon the proposition that, if a servant uses a machine furnished by his master, for a purpose other than that for which it was intended, and which was never contemplated by, or known to, the master, the servant takes the risk of all injuries arising from such use, and cannot hold the master liable therefor."

This principle has been applied by the courts universally.

In

Fanjoy v. Seales, 29 Cal. 243,

the owner of a building was held not liable to plaintiff, a workman who engaged in painting the same, suspended a staging from a cornice that gave way. There was no proof that this cornice was designed for the purpose of supporting staging, nor of any general custom of painters so to use them. Mr. Justice Currey held that the court properly instructed the jury

> "that if the cornice and wall, though defective in construction, were still sufficient for the purposes for which they were designed but were applied by the plaintiff on his own responsibility for purposes requiring greater strength than those for which they were intended, and their fall was in consequence of such application, then no negligence or breach of duty could be imputed to the defendant on account of any such defect in their construction."

Similarly in

> *Gribben v. Yellow Aster Mining etc. Company,* 142 Cal. 248, 75 Pac. 839,

it was held that a miner could not recover for an injury sustained by him in using a rope to descend into a shaft where it was shown that the rope was put there for the purpose of drawing gravel up and where a proper ladder had been provided. The same rule is applied in

> *Kauffman v. Maier,* 94 Cal. 269, 29 Pac. 481, 18 L. R. A. 124.

Here a servant was employed in a malt room, and having an endless towel over his shoulder, which impeded him in his work, he threw it over a projecting end of a shaft about six feet above the floor, the end of which had been battered by hammering so that its edges were jagged and rough. The engine started and the plaintiff, attempting to remove the towel, was caught by the shaft and injured. It was held that the master was under no obligation to make the machinery suitable for a purpose not designed and that a nonsuit should have been granted.

In

Hahn v. Chicago, M. & St. P. Ry. Co., 196 N. W. (Minn.) 257,

a directed verdict for defendant was held proper in an action for personal injuries arising out of the act of plaintiff in getting off a moving locomotive and stepping upon the top of a housing box designed to protect the machinery of a signal tower from exposure to the elements. It was claimed that the defendant was negligent because this so-called platform was not level, that it was slippery, unlighted, and that defendant had failed to warn plaintiff of its unsafe condition. Some evidence was introduced tending to show that some of defendant's switchmen at times had gotten off of moving trains on this housing as if it were a platform. In sustaining the action of the lower court in directing a verdict for defendants, the court uses the following language:

> "The housing for the machinery was built for that purpose, and was not in any way recognized by the company as an alighting place. The housing is a mechanical contrivance of a proper type of construction for the purposes for which it is maintained. If it may be said to have caused injury to appellant, it is only because of his attempt to use it for an improper purpose. It is the duty of the company to see that such instrumentalities are reasonably safe for the performance of the functions for which they are designed. An injury arising out of the improper use of the instrumentality does not justify an inference of negligence. It would be unfair and unjust to require the company to answer for an injury, where the emergency which tested the quality or capacity of the instrumentality arose out of an occurrence which implied no culpability

on its part. Labatt, Master and Servant (1st Ed.), Sec. 26. Such instrumentalities are in the class of switch posts, rails, and other things in and about railroad tracks which render particular places unsafe for alighting; but that does not show negligence on the part of the company.

The record shows that the company did not direct this housing to be used as a platform, and it at no time had any reason to expect that appellant would so attempt to use it. The appellant seems to have imposed upon this instrumentality a new function; namely, that of a platform which the company never contemplated. We find that there was no violation of duty on the part of the company, and that the record fails to disclose actionable negligence upon which appellant may maintain this action. The trial court was right in directing the verdict and in denying the motion for a new trial."

A directed verdict for defendant was likewise approved in the case of

Roberg v. Houston & Tex. C. R. Co., 220 S. W. (Tex.) 790.

This was an action for damages resulting from the death of one of defendant's employees, an experienced foreman, caused by the breaking of a chain used to hoist a wrecked car from the track. It was found, however, that an adequate supply of chains had been given the servant, but that he himself, picked out one that was too light for the purpose to which it was put. The defendant was held not bound to anticipate that an extraordinary or unusual strain would be put upon the appliance in question and was held not liable for any failure in making an inspection of the chain, the evidence indicat-

ing that had a test shown the chain to have been in perfect condition, it still would have been insufficient to sustain the weight of the load put upon it.

In

Manche v. St. Louis Basket and Box Company,
262 S. W. (Mo.) 1021,

an employee stepping on a platform furnished and used for moving material only was held precluded as a matter of law from recovering for injuries sustained when the board broke. At the close of the case the court directed a verdict for the defendant, which was affirmed upon appeal. It was held that plaintiff by his own choice used the platform for a purpose other than that for which it was furnished or intended, and that he was not entitled to recover damages for injuries sustained by reason of such use, even though the platform was defective in fact, when tested by the use to which he put it. It was further held that it was not necessary for defendant to plead contributory negligence as the record disclosed no actionable negligence at all on the part of the defendant, and that this was so, whether the negligence charged in the complaint was in furnishing an unsafe appliance or in failure to furnish a reasonably safe place to work.

Nor can the defendants here be held in anywise at fault by reason of the mere fact that the ring-bolt in question was located in a position where it could be used improperly as the plaintiff used it here. The bolt was not improperly placed with reference to its intended purpose. Nor was it even conveniently located for

the purpose to which plaintiff put it. The only evidence on this subject is that it was so situated as to indicate by its position that it was not designed for the purpose of feeding a line to the windlass as it would not bring the line fair to the spools of the winch (Becker, tr. p. 57; Lancaster, tr. p. 55).

But even on the assumption that it was so located that it could easily be used improperly, no liability is thereby created. This principle is thus expressed in

3 Labatt's Master & Servant, (2d ed.), p. 2463:

> "The mere fact that an appliance happens to be placed where it can be used for the performance of the work which the injured servant undertook to do with it does not warrant the inference that the master intended that he should use it as he did, or the inference that he was in fault in not knowing that he was likely to do so. Any other rule would involve the consequence that every master who leaves any implement upon his premises, which his servants cannot safely use for every purpose which suits their convenience, sets a trap for them."

The case of

Morrison v. Burgess Sulphite Fibre Co., 70 N. H. 406, 47 Atl. 412, 85 Am. St. Rep. 634,

cited in the text, is directly in point on this proposition. The syllabus in the report concisely summarizes the case:

> "An elevator shaft ran up through a mill at an angle of 45°, its sides being covered with canvas. Plaintiff, an employe, was engaged in hoisting a large beam to the top of posts in one of the upper stories, and near the elevator shaft. There was some obstruction on the top of one of the posts, and

> plaintiff stepped onto the canvas covering to raise himself to a point where he could remove the difficulty, and his weight burst the canvas and precipitated him into the shaft. The canvas was covered with dust and chips, and was not distinguishable from ordinary boarding, and plaintiff thought that it was a solid surface. *Held,* that the employer was not liable for injuries resulting to plaintiff therefrom, as the elevator shaft was not intended for the purpose to which plaintiff put it, and he stepped thereon at his peril."

Answering the contention that defendant was at fault in not anticipating that a servant was likely to step upon the canvas by reason of its location, the court says:

> * * * "If the fact that the elevator happened to be where he could stand on it and do his work was evidence either that the defendants intended for him to use it as he did, or that they were in fault for not knowing that he was likely to do so, every master who leaves any implement upon his premises which his servants cannot safely use for every purpose which suits their convenience, regardless of that for which it was provided, sets a trap for them. In that event the master's duty in this respect is not limited to using ordinary care to furnish his servants with tools and appliances which are suitable for the purpose for which they are provided, but it is his duty to furnish such tools and appliances as his servants can safely use for any purpose which suits their fancy."

2. The defendants cannot be held to have acquiesced in the improper use.

It will be recalled that the only testimony in the record concerning the alleged use of these ring-bolts for the purpose to which plaintiff put them prior to the accident

in question, is the plaintiff's testimony that they were used in loading on that day. It has been pointed out that on the other hand the testimony shows that the captain and the former mate for three years last past had never seen the equipment so used on any previous occasion. Nor is there the slightest pretence of any evidence that defendants themselves were aware of the misuse of the equipment or that there was any general custom so to use it from which such knowledge could be presumed. It is true that as an abstract proposition the master's acquiescence in the use of an appliance for some other purpose than that which it was intended puts him in the same position as if the appliance had been orignally furnished for that purpose. But there is no evidence of such acquiescence in the present case. As is said in

3 Labatt's Master & Servant, (2d ed.), p. 2465:

> "But the mere fact that an appliance had been diverted to new uses before the accident in suit will not render the master liable, if that diversion occurred without his knowledge or consent. Nor is an occasional improper use of an appliance, not in pursuance of a recognized custom, sufficient to render the master liable on the ground of acquiescence. Nor will negligence be imputed to an employer of experienced men, so as to render him liable for injuries sustained by them, because he permits them to relax his regulations or disregard his general instructions or advice, when they choose to do so for their own convenience and with knowledge of the risk."

The cases cited by the author amply support the text.

Sievers v. Peters Box and Lumber Company, 50 N. E. (Ind.) 877,

was a case where plaintiff's employee was injured in

using a freight elevator to ride upon. It was shown that the elevator was designed to carry freight exclusively and not passengers. It was shown that it had been used by employees on the first day it was operated. It was held that this would not make any difference, in the absence of proof of knowledge of the defendant and an affirmative showing that it acquiesced in such use of the elevator.

And in

Teetsel v. Simmons, 34 N. Y. Supp. 972,

plaintiff was injured by stepping upon a switchboard which was not designed to be used as a platform. It was shown that it had been occasionally used by the workmen for that purpose, but it was not proved that such use was in pursuance of any custom or by any authority of the master. It was held that the plaintiff being injured by an improper use of the equipment could not recover against the master.

Indeed it has been held that where the servants were experienced men and are, or should be, fully aware of the risk involved, no negligence can be imputed to the master simply because he permits the servants to use the appliances improperly, when they choose to do so for their own convenience and with full knowledge of the risk.

The Persian Monarch, 55 Fed. 333.

Here the plaintiff, a foreman stevedore, injured by an improper use of a derrick rope which imposed a greater strain upon it than it was intended to bear, was held not entitled to recover against the vessel, even

though the respondent knew of the practise of so using these ropes; it being shown, however, that proper equipment and appliances were in fact furnished.

It is submitted that no further citation of authorities is necessary to show that plaintiff has not made out a case of acquiescence by defendants in the improper use to which the ring-bolt in question was put.

3. Defendants were not obliged to instruct plaintiff in the proper performance of his duties.

The plaintiff testified (Tr. p. 26) that he had been a mariner for thirty years, that he was at the time of the accident forty-seven years of age, that he served in the Navy during the Spanish-American War, after which he had been an officer on merchant ships, had another period of service with the Navy during the World War and since 1919 had served as officer and master of merchant ships. In the face of this it is difficult to see how it could be reasonably contended that defendants were obliged specifically to instruct plaintiff as to how every appliance and instrumentality on the vessel was intended to be used. Certainly in the situation defendants would have a right to assume that plaintiff would know the proper use of the vessel's equipment and would devote it to no other purpose. Negligence cannot be imputed to a person by reason of a failure to avert or avoid a peril that a reasonably prudent person would not have anticipated. After an accident has happened, it may be possible to suggest methods by which it might have been avoided; but

that of itself does not prove, nor even tend to prove, that reasonable or ordinary care would have anticipated or provided against it. If authority is needed in support of a proposition so elementary, reference could be made to

3 Labatt's Master & Servant, (2d ed. p. 2756, Sec. 1042),

and also to p. 2765 of the same work (Sec. 1047).

This principle is aptly illustrated in a case in the Northern District of California,

McKenna v. Union Steamship Company, 215 Fed. 284.

This was an action for personal injuries sustained by a seaman, which the evidence showed arose from libelant's choosing an unsafe place from which to oil the steering gear. It was argued that the vessel owed him an obligation to instruct him in his duties. In answer to this contention Judge Dooling says:

> "I cannot agree with libelant that there was any obligation on the part of the libelee to instruct him in his duties, or in the way to perform them. He shipped as an able-bodied seaman. He is 33 years of age, has been going to sea since he was 14 years old, and has been for 13 years sailing up and down this coast. His is not the case of a minor, nor of one whose lack of experience on board ship would cast upon his employer the duty of instructing him in the method of performing the work which his position called for. On the contrary, the employer was entitled to believe that he fully understood all his duties, and if in fact he did not so understand them the

obligation was cast upon him to seek information, and not upon the ship to furnish it unsought.

The fact that he selected a dangerous place from which to oil the steering gear, when there was an absolutely safe place provided for that purpose, does not argue negligence on the part of his employer, unless, indeed, the employer were bound so to close this place that libelant could not enter it at all, a proposition which cannot seriously be maintained. It is indeed, unfortunate that libelant suffered the severe injuries for which he brings this action; but, in the absence of negligence on the part of the libelee, he cannot recover."

Similarly in

The City of St. Louis, 56 Fed. 720,

a deck-hand on a steamer was ordered to paint the smoke-stack, and misunderstanding the directions given him, he placed a ladder weighing about eighty pounds against the smoke-stack which broke it off and the libelant fell, sustaining serious injuries. It was held that the accident was due to the libelant's own ignorance and that he was not entitled to recover damages.

As is said in

Nash v. Wm. M. Crane Co., 125 N. Y. S. 987, 990,

"Is it necessary that the master having supplied proper materials and a proper place to work, shall follow each and every employe around a factory to see that he makes a proper and safe use of the materials furnished? We think not. The master had done his full duty in the premises in furnishing a reasonably safe place in which to

> work and reasonably safe tools and appliances and if the plaintiff, heedless of his surroundings made an improper use of the place and the appliances, the defendant is not to blame."

It is apparent therefore that no liability can be predicated upon the claim that defendants failed to tell plaintiff expressly that a ring-bolt, designed for lashing purposes, was not intended to be used for hauling cargo around the deck.

THE ALLEGED NEGLIGENCE OF THE MATE CANNOT BE CONSIDERED, AS IT IS NOT WITHIN THE ISSUES.

It will be remembered that the complaint proceeds merely upon the theory that defendants failed in their duty to exercise ordinary and reasonable care—that a certain bolt would resist an ordinary pull—*for which said bolt was intended.*

Upon the trial of the case plaintiff attempts to prove that the mate was negligent in not finding him a snatch-block and also in hurrying plaintiff so that he did not have time to rig up the equipment properly. It is submitted that it cannot be seriously argued that a plaintiff can bring an action based upon alleged defective appliances, and then recover on the ground that a fellow servant was negligent in forcing plaintiff to use an appliance for a purpose other than that for which it was intended. Here is certainly a fatal variance between pleading and attempted proof. A great many authorities could be marshaled in support of

this proposition. We shall, however, content ourselves with the citation of a few cases which on their facts are quite analogous to the present case.

In the

Frank D. Stout, 276 Fed. 382,

a case decided by this court, libelant sued for personal injuries, claiming that the vessel was responsible in supplying an unsafe sling, made of wire instead of a chain. After a decree for the claimant the libelant appealed and among other contentions claimed that the evidence showed that the hook was defective as well as the sling. Judge Hunt disposes of this contention in one sentence (p. 385):

> "No basis for recovery can be made on account of the length of the hook, because there was no claim of that kind pleaded * * *."

The case of

Roberg v. Houston & Tex. C. R. Co., 220 S. W. (Tex.) 790,

cited supra, is directly in point on this proposition. The case, it will be remembered was under the Federal Employers Liability Act, the basis of the complaint being that a chain supplied by defendant was not strong enough to be used for hoisting purposes. It was proved at the trial that plaintiff himself selected the particular chain. It was then contended that defendant was at fault in not plainly marking the chain so that it could be distinguished from others which were in fact

strong enough. The court discussing this contention says (p. 794):

> "It is true that the evidence shows that the lifting capacity of a seven-eighths inch chain of this kind is a matter of expert scientific knowledge and could have been ascertained by the railroad company and the chain marked so that any one using it would be informed of the maximum weight it could lift or carry with safety. If the failure to so *mark the chain could be held to be negligence on the part of the railroad company, such negligence was not alleged in the petition, and therefore appellant could not recover on this ground.*" (Italics ours.)

The case of

> *Gregory v. Chicago, M. & St. P. Ry. Co.,* 42 (Mont.) 551, 113 Pac. 1123,

is also precisely in point. In this case plaintiff brought an action alleging that an appliance furnished by defendant for the purpose of removing heavy machinery from a car was not reasonably safe for such work. The testimony showed that the equipment itself was proper, but there was some evidence that defendant's superintendent ordered the machine to be started without allowing plaintiff time to get out of danger. The court, however, permitted the case to go to the jury, presumably on the issue of unsafe appliances and the jury returned a verdict for the plaintiff. The appellate court reversed the judgment and directed the lower court to enter judgment for the defendant. With reference to the contention that the superintendent was

negligent in making a premature order the court has this to say (p. 1127):

> "The order of Long may have been premature, but this is not alleged as negligence, and is not within the issues: so that there is a divergence between the issues tendered by the complaint and the evidence that it cannot be said that plaintiff has proved in substance the cause of action alleged. Hence the conclusion is inevitable that the verdict is not justified by the evidence."

In

De La Mar v. Herdeley, 157 Fed. 547,

the same rule is applied. There it was held that where a complaint is based entirely upon a specific ground of negligence the jury cannot properly find for plaintiff, as the negligence alleged was not proved, even if the evidence tended to show another and different act of negligence. The court on this subject says (p. 549):

> "While the courts are liberal with respect to variances between the allegations and the proof, the rule still exists that a plaintiff, to recover, must substantially prove the material allegations of his complaint. A plaintiff cannot be permitted 'to raise issues for the first time by the evidence or to recover upon an issue other than related in the pleadings'. *Santa Fe, etc., R. Co. v. Hurley,* 4 Ariz. 258, 36 Pac. 216; *Wagner v. N. Y. & St. L. R. Co.,* 76 App. Div. 552, 78 N. Y. Supp. 696. *Heller v. Donellan* (Sup.) 90 N. Y. Supp. 352. Any other practice would fail to apprise a defendant of the demand he is called upon to meet, and a judgment would afford little protection against future recoveries for the same cause, because it would be impossible to tell upon what ground it was rendered."

In

Richards v. City Lumber Company, 101 Miss. 678, 57 So. 977,

under a declaration alleging injury to a servant by the breaking of a defective belt and failure to furnish safe appliances, it was held that plaintiff could not recover upon showing breach of duty by the superintendent in failing to direct him how to handle the machine. Likewise in

Graves v. Metropolitan St. Ry. Co., 175 Mo. App. 337, 162 S. W. 298,

it was held that a petition in a servant's action for injuries from the fall of a ladder on which he was at work charging negligence in failing to put a guard at or near the ladder will not support a verdict for the plaintiff on a theory developed by the evidence that the foreman negligently failed to perform that duty.

The same principle has been applied universally:

Louisville & N. R. Co. v. Hall, 193 Ala. 648, 69 So. 106

(in an action under the Employers Liability Act, plaintiff is confined to proof of the negligence specified in the pleading).

Emmert v. Electric Park Amusement Company, 193 S. W. (Mo. App.) 909

(the employee cannot rely on negligence of the employer which he has not pleaded).

Charlotte Harbor and Ry. Co. v. Truette, 81 Fla. 152, 87 So. 427

(plaintiff confined to the issue of negligence set out in the complaint).

Louisville & N. Ry. Co. v. Wright, 217 S. W. (Ky.) 1016

(a fireman based his complaint on alleged negligence of the engineer; case submitted on issue of defective appliances; held reversible error).

No useful purpose would be served in further elaborating on this well settled rule.

And this very case is a striking illustration of the necessity for such a principle. In the present case plaintiff alleges unsafe place to work and defective appliances, and makes no charge of negligence of fellow servants in his complaint. Defendants are obliged to take the deposition of the chief officer, who being a seafaring man, cannot be produced upon the trial. This witness was called for the purpose of proving that plaintiff himself was in charge of the work, the witness testifying that he was at the other end of the ship when the accident occurred and he did not hear of it until about one hour afterwards. Then at the trial plaintiff attempts to prove that the mate did not tell him where he could find a snatch-block and also that he hurried him so that he could not set up the equipment properly. On top of this plaintiff has now the temerity to claim in his brief that these allegations

were not denied by the chief officer! Certainly here would have been a gross miscarriage of justice if plaintiff had been allowed to go to the jury on the issue of the mate's negligence, raised for the first time upon the trial, no inkling of which claim is contained in the complaint.

EVEN ACCEPTING THIS EVIDENCE, PLAINTIFF WOULD STILL NOT BE ENTITLED TO A VERDICT.

As has been pointed out it would have been entirely improper for the court below to have allowed the case to go to the jury on allegations of negligence not pleaded. But an examination of the record shows that even accepting plaintiff's claims at their face value and even erroneously assuming that the jury would have been entitled to consider this evidence, plaintiff still would not have made out a cause of action upon any theory.

It is first contended that the mate was negligent in failing to direct plaintiff where he could find a snatch-block. The plaintiff also testified that he looked for a snatch-block and could not find one. The captain testified there were three on the ship at the time. Plaintiff, one of the mates, certainly might well be required to know where to find one after two months on the vessel. Let us nevertheless, assume that plaintiff was not at fault, and that no block was immediately available. It is true that had a snatch-block been used in connection with the ring-bolt the strain put upon it would have been materially lessened and in all probability the accident

would not have happened. The testimony, however, is clear that the ring-bolt was not supposed to be used in handling cargo at all, either with or without a snatch-block. Had a snatch-block been interposed, the use of the ring-bolt might conceivably have been justified as an emergency measure, but without a snatch-block, every witness in the case is unanimous in condemning the plaintiff's folly in attempting to run a line through this bolt in the manner in which he did. The fatal difficulty about plaintiff's contention in this connection is that there were proper facilities provided on the ship for the movement of cargo, which did not require the use of a block. Instead of using such appliances, plaintiff urges his inability to find a snatch-block as an excuse for employing another portion of the vessel's equipment in an entirely different manner from that in which it was supposed to be used. In other words the situation is this:

1. A safe means of moving the cargo was provided, namely, with the fair leads or bitts.

2. Employing the ring-bolt for the purpose without a snatch-block was shown to be an absolutely indefensible practice.

3. Had a snatch-block been used, the use of the ring-bolt might conceivably have been justified.

In the above situation how can any reasonable man be heard to contend that even assuming a snatch-block was not available, an experienced licensed officer is entitled deliberately to choose an unsafe method of doing work in preference to the safe method provided by the employer?

Plaintiff himself, however, realizes that this position is entirely untenable and therefore attempts to take refuge in the assertion that the mate did not give him time to rig up the gears. In his testimony in rebuttal, plaintiff announces for the first time that he attempted to use the regular fair leads first, but that the rope jumped off. He assigns as a reason for the use of the ring-bolt that he had to hold the rope down. This contention, we desire to point out, comes out for the first time on rebuttal, after defendant's testimony had made it apparent to plaintiff that he had to explain his failure to use the regular equipment on the ship, or that his case was lost. Then appears the significant statement (Tr. p. 73):

> "There was another way to do it if the mate would have given me time to rig up the gears."

Without waiving our contention that this claim is entirely outside the issues, and cannot be considered, we think it can be demonstrated that plaintiff's own testimony shows it to be entirely without merit. In the first place it is hard to understand how it can be successfully contended that the desire on the part of the mate to have the work accomplished in a hurry would excuse the man who had full charge of the after end of the vessel from taking reasonable precautions, not only for his own safety, but for the safety of the men under his direction. It must be remembered that no one directed plaintiff to use the ship's equipment in the particular manner in which plaintiff employed it. But be that as it may, it clearly appears from plain-

tiff's own testimony that he had plenty of time to rig up the lines in any way that he wanted, even assuming that it would have taken more time to have done the job properly than to have misused the ship's equipment in the manner in which he did. Plaintiff testified (Tr. p. 26):

> "about *eleven o'clock* in the morning *on my end of the ship,* the chief officer, Ole Grande, came to me and said, 'Well, this afternoon, Mr. Sporgeon, you will have the longshoremen remove the laths from the hatch aft and amidships'. We had about three carloads of laths, covering fore and aft midships of the hatch. These had to be moved in order to get about twelve thousand feet of lumber out in the morning in another place, while the men were there."

He testified that he immediately looked the situation over to decide what he would need to accomplish this task. On his own statement it was after *one o'clock* when the work actually commenced (Tr. p. 28). On cross-examination he admitted that the maximum time that it would have taken to rig up the equipment properly would have been fifteen to thirty minutes (Tr. p. 38).

Thus on his own testimony plaintiff has demonstrated how untenable is this claim that he was crowded for time. He admits over two hours from the time he received the order to the time when he started to carry it out and claims that it would have taken at most fifteen to thirty minutes to put the equipment in proper condition. Certainly he cannot now be heard to say

that he misused the appliance only because the mate did not give him time to do the work properly.

CONCLUSION.

We believe there can be no doubt that the court properly directed a verdict for defendants, and that there is no merit in this appeal. The record is utterly barren of any evidence of negligence on the part of the defendants and shows convincingly that the unfortunate accident in this case arose entirely from plaintiff's own misuse of equipment.

It is respectfully submitted that this Honorable Court can take no other view of the situation and will without hesitation affirm the judgment of the court below.

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Dated, San Francisco,
November 14, 1925.